1980

Utah Mortgage Loan Corporation v. Betty J. Black, Individually And As Personal Representative of The Estate of Don J. Black, And Don J. Black Realty, Inc : Brief of Defendants-Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH MORTGAGE LOAN COMPANY, a corporation,	:	
Plaintiff-Appellant,	:	Case No. 16610
vs.	:	
BETTY J. BLACK, et al.,	:	
Defendants-Respondent.	:	

On Appeal from the District Court
for the Third Judicial District
in and for Salt Lake County, Utah

Honorable Christine M. Durham, District Judge

BRIEF OF DEFENDANTS-RESPONDENT

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STATEMENT OF THE CASE

This is an action by plaintiff-appellant Utah Mortgage Loan Company ("Utah Mortgage") to recover Thirty-eight Thousand Four Hundred Seventy-six Dollars and Forty-three Cents ($38,476.43) (R. 4) or Thirty-six Thousand Seven Hundred Sixty Dollars and One Cent ($36,760.01) (R. 26 and Appellant's Brief, p. 3) principal--plaintiff's version of the correct amount has varied from time to time with the

former amount claimed in its Complaint and the latter in its Brief--plus interest thereon from defendants-respondent. Plaintiff claims that the above sum represents the unpaid principal balance on a Six Hundred Seventy-five Thousand Seven Hundred Fifteen Dollar ($675,715.00) loan, secured by a real estate trust deed, which it made to Betty J. (Mrs. Don J.) Black, the late Don J. Black and Don J. Black Realty, Inc. (hereinafter collectively "the Blacks") on June 26, 1975. R. 2. The Blacks denied that any portion of the loan remained unpaid and further contended that plaintiff's claim was barred in any event by the One-Action Rule. R. 9-11. Summary judgment has been entered in defendants' favor (R. 68-69) and plaintiff appeals.

1. The Subject Transaction. It is undisputed that plaintiff did lend $675,715.00 to the Blacks, on a deed of trust note, on or about June 26, 1975[1] for a term of eighteen months at interest of ten percent (10%) or two percent (2%) above First Security Bank of Utah's prime

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[1] Appellant's suggestion that Mr. and Mrs. Black were sureties, rather than principals (App. Br., pp. 17-20) is an assertion which plaintiff devised for the first time on appeal without any foundation in the record. Mr. and Mrs. Black appear on the note as borrowers and principals, not as sureties or guarantors. R. 4. Indeed, the Complaint describes them as principals (claiming that Mr. and Mrs. Black "made, executed and delivered to plaintiff their Deed of Trust Note." R. 2) and nowhere refers to them as anything but borrowers. The characterization of them as guarantors is an entirely novel notion which surfaced for the first time in Utah Mortgage's brief on appeal.

rate, the rate to be adjusted month to month. R. 4. It further is undisputed that the loan was secured by a real estate trust deed, with power of sale and assignment of costs (R. 16-17), which was in the nature of a mortgage. The deed conveyed to McGhie Land Title Company, Utah Mortgage's trustee, land which had an appraised value of Eight Hundred Ninety-four Thousand Dollars ($894,000.00). R. 25.

Plaintiff claims that $38,476.43 or $36,760.01 of the $675,715.00 principal has not been paid (R. 3); the Blacks claim that the loan was paid in full. R. 10.[2] However, the other details of the Utah Mortgage-Black transactions are clear and not in dispute: The mortgaged property had been purchased for subdividing. A subdivision in fact was created and the land was sold on a lot-by-lot basis. The trust deed provided that, at Utah Mortgage's sole election, the property could be released piecemeal, upon payment of a

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[2] Appellant's statement at page 3 of its Brief that "[a]ccording to the uncontradicted affidavit of Craig D. Anderson, one of Utah Mortgage's loan officers, the unpaid balance of the loan is $36,760.01 (R. 25 (§2))" is misleading. That allegation is denied by the Answer. R. 10. Further, the claim would have been denied by affidavit, had Mr. Anderson's affidavit been served early enough for a response. (The affidavit was received by defendants' counsel very shortly before the hearing on the pending Motion for Summary Judgment.) Defendant did file an affidavit of counsel, pursuant to the terms of UTAH R. CIV. P. 26(f), stating that Mrs. Black, the only person who could prepare an affidavit on personal knowledge, was unavailable to respond to the Anderson affidavit on such short notice. R. 52.

suitable share of the loan.[3] R. 17; App. Br., p. 6. It appears from the record that Utah Mortgage was free to set any release price it chose. (In fact, Utah Mortgage exercised that discretion by varying the release price to maintain what it considered a satisfactory cash flow. R. 26.) The trustee, on Utah Mortgage's instructions, released lots to the Blacks' purchasers, retaining Five Thousand Two Hundred Dollars ($5,200.00) to Five Thousand Five Hundred Dollars ($5,500.00) of the purchase price from each sale. Ibid. By Utah Mortgage's calculations, a per-lot release price of $5,200.00 represented 115% of each lot's pro rata share of the loan amount. Ibid. In other words, the number of lots in the mortgaged property times $5,200.00 would have exceeded the loan amount by 15%; the $5,500.00 release price was even more favorable to plaintiff. Because the property's appraised value of $894,000.00--even before improvement and subdivision increased its value--was 30% higher than the amount of the loan (R. 25), Utah Mortgage could have withheld an even higher release price, had it so desired. In any event, the trustee eventually released all the lots in the subdivision on Utah Mortgage's instructions. R. 19, 30.

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[3] The parties' "agreement" to lot-by-lot release of the mortgaged property, of which appellant attempts to make much, consisted of the Blacks' agreement that "[a]t any time and from time to time upon written request of [Utah Mortgage] ..., the Trustee [McGhie Land Title Company] may ... reconvey ... all or part of the property." R. 17. The "agreement" gave Utah Mortgage complete discretion to release the land on any basis it desired.

There is no dispute as to the following material facts:

1. All releases of the mortgaged property were made by the trustee at Utah Mortgage's request and without fraud. R. 43.

2. Utah Mortgage did not foreclose upon the collateral before commencing litigation against the Blacks on the trust deed note. Ibid.

3. There has been no showing or indication that the value of the mortgaged real estate was insufficient for Utah Mortgage to have realized the property's full value through foreclosure. Indeed, the only evidence before the Court concerning the property's value indicated--without question by any party--that the property, even before subdivision, which naturally would have increased its value, was worth at least thirty percent (30%) more than the amount. R. 25.

4. Utah Mortgage's right to demand any payment it chose as a condition of releasing lots was unrestricted. R. 17. It could and did vary the release price to suit its perception of necessary cash flow. R. 26.

5. A release price of even $5,200 per lot would have been more than sufficient to retire the loan, had Utah Mortgage collected that price on each lot. Ibid.

6. There is no allegation or evidence that Utah Mortgage's failure to collect the full amount of the loan or, alternatively, to retain the land was caused by any act of the Blacks.

Respondents contend that there is no remaining indebtedness on the note. R. 10. Utah Mortgage claims that $38,467.43 (R. 3) or $36,760.01 (R. 26)--the amount varies, depending upon which of plaintiff's papers one reads--of the loan's $675,715 principal amount was unpaid. Utah Mortgage apparently claims that it somehow lost track of the loan balance and released all the mortgaged lots before the loan had been paid off. If Utah Mortgage's claim is true, it perpetrated a bizarre oversight, consisting essentially of an inability to count.

Appellant has made no real attempt to justify its conduct. It simply asserts, at page 3 of its Brief:

> Because of various cost overruns, delays and unforeseen expenses, the amount required to complete the project, and the corresponding funds disbursed from the loan amount[,] exceeded the fair market value of the lots comprising the project. (R. 26 (¶7).)

This statement simply does not make sense and appellant, apparently perceiving its silliness, does not try to rationalize it. Utah Mortgage had lent $675,715; if it had required payment of $5,200 against the loan as a condition of releasing

each lot in the subdivision, one of two events would have occurred: the loan would have been paid off in full long before the last lot was released, or the lots would not have been released and appellant could have foreclosed upon them. Only two conclusions logically can be drawn from Utah Mortgage's conduct: either the loan in fact has been paid off and Utah Mortgage has filed an unfounded lawsuit or some Utah Mortgage employee has perpetrated an act of extreme negligence and oversight which the company seeks to expiate by this action.

2. The Parties' Positions. The Blacks answered the Complaint, denying that there was any unpaid balance on Utah Mortgage's note. R. 9-11. Shortly afterward, they moved for summary judgment, on the ground that plaintiff's action was barred by the "One-Action Rule" (UTAH CODE ANN. §78-31-1 (1976 Repl. Vol.)) and plaintiff's reconveyance of the encumbered property. R. 14-15. Defendant resisted the Motion and filed a purported Motion for Summary Judgment of its own. That Motion, however, sought judgment only as to the Blacks' Third, Fourth, Fifth and Sixth Defenses, not judgment upon plaintiff's claim. R. 20. The Blacks resisted plaintiff's Motion on various grounds, including that it was untimely, having been served less than ten days before the date set for hearing (in violation of UTAH R. CIV. P. 56(c)), that its supporting affidavits did not conform to the requirements

of UTAH R. CIV. P. 56(e), and that it did not seek judgment upon any claim of the Complaint. R. 49. The tardiness of plaintiff's Motion made a more substantive response impractical.

The Motions came before the Court on the parties' papers, affidavits and oral argument on June 29, 1979. Prior to the hearing, defendants pointed out, by their papers, that the affidavit of Craig D. Anderson (which, by the way, is the only evidence appellant has cited in its Brief) was nearly entirely inadmissible under the terms of UTAH R. CIV. P. 56(e). R. 49. However, Utah Mortgage gave no indication of a need or desire for additional evidence; it apparently had told its side of the story as well as it could or, at least, as well as it wanted to.

The Blacks' position, both in this Court and below, is that the One-Action Rule precludes any action to recover a debt secured by a real estate mortgage other than through foreclosure and deficiency proceedings, unless the security has been lost or destroyed without the act or neglect of the mortgagee. In this case, the security obviously was lost through the act and neglect of Utah Mortgage. Utah Mortgage's opposition to the judgment is threefold: that the Blacks somehow agreed to appellant's absent-minded releases of the collateral (App. Br., pp. 5-10); that Utah Mortgage's "recovery on the promissory note could only be barred if it were

negligent in releasing the collateral" (App. Br., p. 5); and that Mr. and Mrs. Black, as alleged sureties, are not entitled to the protection of the One-Action Rule. App. Br., pp. 17-20.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY HELD THAT PLAINTIFF-APPELLANT WAS BARRED FROM PROCEEDING AGAINST DEFENDANT BY REASON OF THE ONE-ACTION RULE.

1. Utah Mortgage is barred from proceeding personally against the Blacks by its failure to foreclose on the secured property.

Section 78-37-1 (1976 Repl. Vol.), Utah Code Annotated, provides, in pertinent part:

> There can be one action for the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate which action must be in accordance with the provisions of this chapter. ...

It repeatedly has been held that the remedy provided by Section 78-37-1, its identical predecessor statutes and analagous statutes of other states is exclusive and that a debt secured by a real estate mortgage may be enforced only through foreclosure followed by a deficiency judgment;

direct actions against borrowers are prohibited. Stewart Livestock Co. v. Ostler, 105 Utah 529, 144 P.2d 276, 281-283 (1943). Accord, United Growth Corp. v. Kelly, 86 Mich. App. 82, 272 N.W.2d 340, 343 (1978) ("[M]ortgage foreclosure proceedings are strictly statutory and courts are bound by statutory provisions." "Mortgage foreclosure proceedings are special and statutory, and not an exercise of inherent equity power of the Court."); Bisno v. Sax, 175 Cal. App. 2d 714, 345 P.2d 814, 819 (1959). The "One-Action Rule" applies to enforcement of trust deeds as well as mortgages--an unsurprising result, since both instruments are identical as a practical matter. E.g., Bank of Italy v. Bentley, 217 Cal. 644, 658, 20 P.2d 940, 945 (1937); Walker v. Community Bank 111 Cal. Rptr. 897, 518 P.2d 329, 331 (1974); Bisno v. Sax, supra, 346 P.2d at 819. Cf., Mallory v. Kessler, 18 Utah 11, 14, 54 Pac. 892 (1898).

The Rule requires a mortgagee seeking to recover a debt secured by real estate first to foreclose on the mortgaged property; only in the event of a deficiency may it proceed against the mortgagor personally. UTAH CODE ANN. §78-37-1, 2 (1976 Repl. Vol.). It is well established, under Utah law, that "the personal liability of the mortgagor cannot be enforced until the [mortgaged] security has been exhausted." National Bank of Commerce v. James Pingree Co., 62 Utah 259,

218 Pac. 552 (1923), cited in Cache Valley Banking Co. v. Logan Lodge, etc., 88 Utah 577, 56 P.2d 1046, 1049 (1936). A mortgagee's failure to avail himself of the statutory remedy will bar any other remedy. Donaldson v. Grant, 15 Utah 231, 240-241, 49 Pac. 779 (1897). The only recognized exception to the Rule is "where the security has been lost through no fault of the mortgagee" and foreclosure obviously would be idle and fruitless procedure. Cache Valley Bank of Commerce v. Logan Lodge, supra, 56 P.2d at 1049. (In Cache Valley Bank of Commerce, plaintiff was a second mortgagee; the first mortgagee already had foreclosed upon the land and the profits from the foreclosure "were not sufficient to satisfy [even] the first mortgage." The land's remaining value unquestionably was nil. Id., 56 P.2d at 1049.) That exception is available only upon proof that the security, through circumstances beyond the mortgagee's control became completely valueless. Security First Nat'l Bank v. Chapman, 31 Cal. App. 2d 182, 87 P.2d 724, 726-727 (1929); Cache Valley Banking Co. v. Logan Lodge, supra, 56 P.2d at 1049. ("It was no fault of the plaintiff's that the security for its note was lost. The fault is rather with the defendant for failing to pay the first mortgage and thus causing it to be foreclosed. The plaintiff could not have prevented the loss of its security... ." (emphasis added.)); Bailey v. Hansen,

105 Mont. 552, 74 P.2d 438, 440 (1937) (A mortgagee is excused from foreclosure only if "the security has become valueless through no act of his.").

The Rule's purpose is to create a regularity and predictability in real estate financing. OSBORNE, MORTGAGES §334, at 700-702 (2d ed. 1970). As the Utah Bankers Association, amicus curiae herein, states, the Rule should be applied "to avoid frustrating the reasonable expectations of lenders and borrowers." Amicus Br., p. 1. The Blacks were entitled to rely upon Utah Mortgage's competence and care in maintaining its collateral after they had deeded their real estate to its trustee. The record reveals no evidence--much less proof--of the property's destruction or valuelessness in this case. Indeed, plaintiff concedes that, even before improvement, that the mortgaged property had an appraised value, as relatively raw land, of $894,000 (R. 25)--enough to satisfy a $675,715 principal amount, with nearly $220,000 left over for interest.

If Utah Mortgage lost the security for its loan before that loan was paid off, it did so through a voluntary reconveyance of the property, not through destruction or prior foreclosure. At best, Utah Mortgage can claim only that its security was lost through its neglect and inadvertence. Such a loss cannot excuse a mortgagee from the

One-Action Rule's requirements, as Utah Mortgage admits. ("Utah Mortgage's ... recovery on the promissory note could only be barred if it were negligent in releasing the collateral." App. Br., p.5). This Court held in Donaldson v. Grant, supra, 240-241, that a mortgagee who lost his security through a failure to make a timely recording was barred from proceeding personally against the mortgagor.

> The plaintiff having lost his right to foreclose his mortgage on the property by his neglect to have its assignment to him recorded, the further question arises, can he maintain his action against Grant, the maker of the note, and the mortgage to secure it? ... [T]hese can be but one action for the recovery of a debt or the enforcement of any right secured by mortgage upon real estate or personal property; that the court may direct a sale of the incumbered property ... and apply the proceeds to the payment of costs and the amount due the plaintiff, and, if it appears ... that the proceeds are insufficient, a judgment may be docketed for the balance against the defendant personally liable for the debt ... . This section requires the property mortgaged to be subjected first to the payment of the debt, and the mortgagee or any assignee of the note cannot recover a personal judgment unless the proceeds of the sale of the property mortgaged prove to be insufficient.

The Court added:

> "It may be that if the mortgagor's title to the land has become extinguished subsequent to the making of the mortgage, by title paramount, or if the mortgaged property has been destroyed or ceased to exist, the mortgagee need not go through the idle form of bringing an action for the foreclosure before he can have a judgment on the note. But, when the mortgagee by his own act or neglect deprives himself of the right to foreclose the mortgage, he at the same time deprives himself of the right to an action on the note. ..." [citation omitted.]

Id, 15 Utah at 241. Accord, Hibernia Sav. and Loan Co. v. Thornton, 109 Cal. 427, 42 Pac. 447, 448 (1895) (holding that mortgagee's failure to present a claim in probate similarly barred him from personal action). Appellant does not dispute that its claim would be barred if the security for the Blacks' loan had been lost through its neglect. (In fact, Donaldson states that the mortgagee forfeits its rights if the property is lost through its act or neglect.

Appellant does not--and cannot--dispute that, had it kept proper track of the lots which it was releasing, the Blacks' indebtedness would have been satisfied from the collateral.

The question before the Court then is whether Utah Mortgage's alleged premature release of the collateral

constituted an "act or neglect" by it. It appears clear that it does. The parameters of the applicable Utah law are defined by the Donaldson and Cache Valley Banking Company cases, supra. Failure to record a mortgage was an "act or neglect" sufficient to defeat a mortgagee's right to proceed personally in Donaldson; by contrast, loss of the property through paramount title of a prior mortgagee (which the second mortgagee obviously could not have prevented) was not sufficient to defeat those rights in Cache Valley Banking.

Utah Mortgage's failure to keep track of its property clearly is equivalent to (if not even more extreme) than the mortgagee's conduct in Donaldson. The type of loss which will not defeat a mortgagee's right to recovery is described by McMillan v. United Mortgage Co., 82 Nev. 117, 412 P.2d 604, 606 (1966):

> [I]f the security, without fault of the mortgagee or beneficiary, has become valueless as where the security has been destroyed by fire and other similar situations.

(Emphasis added.) More pointedly, this Court ruled in Cache Valley Banking Co. v. Logan Lodge, supra, 56 P.2d at 1949, that the test is whether the mortgagee "could not have prevented the loss of its security." Obviously, Utah Mortgage, through its trustee, could have prevented the loss.

Utah Mortgage attempts to exonerate itself from

the consequences of its acts by raising something analagous to a claim of contributory negligence: that even though it was negligent, so were the Blacks. That claim simply will not wash. First, there is no evidence whatever that the Blacks were aware that Utah Mortgage had lost track of its collateral. Second, the law is specific that the test is whether the property was lost through the "act or neglect" of the mortgagee (in the words of Donaldson) or when the mortgagee "could not have prevented the loss" (in the words of Cache Valley Banking).

The law imposes a burden of proper performance upon the mortgagee. If it fails in its responsibility, it cannot be exonerated by the conduct of some other party. Indeed, the rule which Utah Mortgage proposes--without any support in the case law--would be grossly unfair. As beneficiar of the trust deed, appellant, a large, sophisticated banking institution, was uniquely capable of keeping track of its collateral. As the court noted in Girard Trust Bank v. O'Neill, 219 Pa. Super. 363, 281 A.2d 670, 671 (1971), once a bank takes control of collateral, as Utah Mortgage had, the borrower has no way of ensuring that the collateral will be protected in a careful manner. By contrast, Utah Mortgage had ample means of ensuring the collateral's integrity. The proper rule is clear from a comparison of the cases which have disallowed a mortgagee to sue personally (e.g., Donaldson

and Hibernia Sav. and Loan Co, supra) with those which have allowed it to do so (e.g., Cache Valley Banking, supra, First Nat'l Bank, Giddings v. Helwig, 464 S.W.2d 953, 954 (Tex. Civ. App. 1971) (involving loss of collateral through a fire)): the mortgagee is relieved from its duty to proceed by foreclosure only if the property is lost through circumstances beyond its control (i.e., where it "could not have prevented the loss," in the words of the Cache Valley Banking decusion). In the instant case, the mortgaged property's release admittedly was completely within Utah Mortgage's control.

Utah Mortgage held the Blacks' property as security on a loan which became due on January 1, 1977. More than two years after the due date--after allowing its borrowers to dispose of whatever proceeds they had received from sale of the secured property in the reasonable belief that Utah Mortgage had drawn funds necessary to repay the loan--the company discovered its error (assuming that there actually was a balance due) and sued the Blacks for funds which should have been accounted for long ago. Utah Mortgage had perpetrated the very kind of mismanagement which the Rule penalizes.

2. Utah Mortgage cannot excuse its apparent loss of collateral by reason of the Blacks' alleged agreement to its release.

There is no evidence in the record that the Blacks agreed to any release of collateral beyond the provision of the trust deed cited at page 6 of Appellant's Brief (Note and at 3, supra), which authorized Utah Mortgage to release lots at its sole discretion. Certainly, such a provision carries with it at least an implied agreement by Utah Mortgage to dispose of the collateral in a careful and prudent manner. Utah Mortgage in effect is urging that a waiver of plaintiff's rights under the One-Action Rule has occurred. However, the record reveals no basis for finding a waiver.

The standard for finding of waiver is explicit.

> A waiver is the intentional relinquishment of a known right. To constitute a waiver, there must be an existing right, benefit, or advantage, or knowledge of its existence, and an intention to relinquish it. It must be distinctly made... .

Phoenix Ins. Co. v. Heath, 90 Utah 187, 194, 61 P.2d 308, 311-312 (1936). The only agreement between Utah Mortgage and the Blacks for the release of lots was the trust deed, which gave Utah Mortgage discretion to release the lots as

it chose. That agreement certainly neither contains nor implies a consent to prematurely surrender the collateral. Indeed, had Utah Mortgage implemented what it claims to have been its release program--of retaining $5,200.00 or $5,500.00 per lot[4]--the loan would have been discharged with funds to spare. Appellant, if its allegations are to be believed, simply did not keep track of its property. There is not a shred of evidence that this sloppiness was agreed to by the Blacks.

The trust deed was executed against a background of longstanding real estate financing practices:

> A construction loan is the usual source of funds with which the builder will finance the improvements he will build on the land. In essence, the construction loan is a short-term loan, usually secured by a first mortgage or deed of trust on the property, which will be paid off in full as to each lot when the lot is ultimately sold to a home buyer.

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[4] In fact, there is no competent evidence that the Blacks agreed to Utah Mortgage's specific release program. The only reference to such an agreement occurring in the record below is the Anderson affidavit (R. 26), which asserts:

> At the time it made the loan Utah Mortgage agreed with the Blacks and Black Realty that it would give a partial release to individual lots in the proposed subdivision upon payment of $5,200.00 per lot. ... The release price was later raised to $5,500.00.

NELSON & WHITMAN, CASES AND MATERIALS ON REAL ESTATE FINANCE AND DEVELOPMENT, 553 (1976) (cited at Amicus Curiae's Brief, p.2). To suggest that the Blacks agreed to a waste of the collateral when they agreed to a practice which routinely is implemented to pay off is utterly untenable speculation. It does not amount to a genuine issue of fact which could defeat summary judgment. Tyler v. Vickery, 517 F.2d 1089, 1094 (5th Cir. 1975); reh. denied, 521 F.2d 814 (1975), cert. denied, 426 U.S. 940 (1976); Fireman's Mut. Ins. Co. v. Aponaug, 149 F.2d 359, 362 (5th Cir. 1945).

The cases of consent to a discharge of security which appellant has cited (Mono Irr. Co. v. State, 32 Cal. 194, 162 P.2d 647 (1916); Utah Ass'n of Credit Men v. Jones, 49 Utah 519, 164 Pac. 1029 (1917)) involved clear consents to specific sales. They are not analogous to the instant case.

Even if the Blacks had made an agreement by signing the trust deed, which was simultaneous with the loan (R. 2, 16) which waived the One-Action Rule, such an agreement would be void. As was held in Salter v. Ulrich, 22 Cal. 2d 263, 138 P.2d 7, 9 (1943):

> Since necessity often drives debtors to make serious concessions when a loan is needed, [the One-Action Rule] should be applied to protect them and to prevent a waiver in advance.

The affidavit contains no claim of personal knowledge or affirmative showing that Mr. Anderson was competent to testify on the subject of the release. It is inadmissible under UTAH R. CIV. P. 56(e).

There is no Utah case on the point decided by Salter. The California rule is sound and should be applied.

II.

MR. AND MRS. BLACK WERE NOT SURETIES AND, EVEN IF THEY WERE SURETIES, UTAH MORTGAGE'S FAILURE TO FORECLOSE WOULD BAR A CLAIM AGAINST THEM.

Utah Mortgage as argued that Mr. and Mrs. Black signed their note of June 26, 1975 as sureties rather than principals. The note upon which plaintiff sues represents Mr. and Mrs. Black to be principals, not sureties. It is universally recognized that "[i]f a note is signed by two or more makes, it will be presumed that they are co-makers and liable as such, and not as principal and surety." In re Chamberlain's Estate, 44 Cal. App. 2d 193, 112 P.2d 53, 57 (1941). Accord, Morris' Estate v. Kirby's Estate, 192 Okl. 69, 133 P.2d 896 (1945). There is no evidence in the record which could overcome that presumption.

Plaintiff seeks to defeat a summary judgment on the basis as "issue" of fact which is sheer speculation. Such an "issue" may not enter into a summary judgment proceeding. Tyler v. Vickery, supra; Fireman's Mut. Ins. Co. v. Aponaug, supra.

Even if Mr. and Mrs. Black were sureties, Utah Mortgage's release of the collateral would discharge them as well as Black Realty. There is indeed authority--although it apparently exists only in Nevada (First Nat'l Bank of Nevada v. Barengo, 91 Nev. 396, 536 P.2d 487 (1975); Coombs v. Heers, 366 F. Supp. 851 (D. Nev. 1973))--that a mortgagee may proceed directly against a surety, leaving the surety to recover against the mortgagor, when the security has not been compromised. However, it is universally held that, under no circumstances may a mortgagee who has allowed the collateral to be wasted recover against the surety. A creditor has a duty to a surety to preserve the collateral against which the surety may recover if he is required to discharge his principal's obligation. Should the creditor compromise that collateral, or discharge the principal debt, the surety is discharged to the extent of the loss. E.g., Inland-Ryerson Const. Co. v. Brazier Const. Co., 7 Wash. App. 338, 500 P.2d 1015, 1019 (1972); Breckenridge v. Mason, 64 Cal. Rptr. 201, 207, 256 Cal. App. 2d 121 (1967). The Restatement provides:

> Where the creditor has security from the principal and knows of the surety's obligation, the surety's obligation is reduced pro tanto if the creditor
> (a) surrenders or releases the security, or
> (b) wilfully or negligently harms it, or
> (c) fails to take reasonable action to preserve its value at a time when the surety does not have an opportunity to take such action.

RESTATEMENT, SECURITY (1941), §132. The rule of the Restatement appears to have been followed in every reported decision which involves a compromise of collateral by the principal creditor. E. g., O'Grady v. First Union Nat'l Bank, 296 N. C. 212, 250 S.E.2d 587, 598 (1978); Girard Trust Bank v. O'Neill, 219 Pa. Super. 363, 281 A.2d 670, 671 (1971) (holding that once a bank took control of collateral, it must sustain the loss if the collateral was collected in a negligent manner); First Nat'l Bank v. Haugen Ford, Inc., 219 N.W.2d 847, 852 (N. D. 1974); Chicago Bridge and Iron Co. v. Reliance Ins. Co., 46 Ill.2d 522, 264 N.E.2d 134, 136 (1970); Walin v. Young, 181 Ore. 185, 180 P.2d 535, 537 (1947).

Appellant has offered no reason why the Restatement and the rule of numerous jurisdictions should not be followed. If Mr. and Mrs. Black were sureties, they should have the same rights as all other sureties.

Finally, appellant's claim of suretyship, not having been raised below, is improperly before this Court and should be disallowed. Automatic Radio Mfg. Co. v. Hazeltini Research, 176 F.2d 799, 809 (1st Cir. 1949).

III.

PLAINTIFF'S "MOTION FOR SUMMARY JUDGMENT" PROPERLY WAS DENIED.

Plaintiff's Motion for Summary Judgment, as the record reveals, was untimely filed. Defendant did not have time to respond to it on the merits and the Motion should have been disregarded in any event. Further, the Motion was improper in that it attempted only to defeat certain affirmative defenses and did not seek judgment on a claim of the Complaint. The Complaint herein consists of a single claim: to recover an alleged debt. It is well established that a motion for summary judgment may not seek less than judgment on at least one claim of a complaint. It may not be used as a device for attacking specific defenses or components of a single claim. Marino v. Nevitt, 311 F.2d 406, 408 (3d Cir. 1962); United States v. Burnett, 262 F.2d 55, 58-59 (9th Cir. 1958) (disallowing a motion for summary judgment addressed to certain items of damages only); Biggins v. Oltmer Iron Works, Inc., 154 F.2d 214, 216 (7th Cir. 1946). Finally, the Craig Anderson affidavit (R. 25-26), which is the sole evidentiary support of the Motion, is inadmissible, as has been discussed above.

Plaintiff's Motion for Summary Judgment was improperly taken and was properly denied.

CONCLUSION

This is not the far-reaching matter which plaintiff

and the amicus curiae have characterized it as being. This is a case of a large lending institution, through almost unbelievable incompetence, forfeiting collateral. It seeks now, in disregard of well established rules of law, to make its debtors pick up the tab for its failure. No material fact concerning the subject transaction is in dispute. Summary judgment properly was entered below and should be affirmed by this Court.

DATED this 1st day of January, 1980.

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